



RIGHTS STUFF

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Responding To All Complaints Is Best Defense

Preventing all harassment in the workplace may be impossible. But responding to all complaints appropriately is not, and doing so provides businesses with an important legal defense, as illustrated by a recent case.

Christine Brenneman began working for Famous Dave's in Iowa in January, 2003, as an assistant manager. Her immediate supervisor was Dave Ryburn. He began making sexual advances towards Brenneman shortly after she began her job. He winked and blew kisses at her daily. At least twice a day, he pulled on the badge attached to the front of her belt. On one occasion, he slapped her on her buttocks. He suggested conducting a review of her work at her house instead of at work. When she asked him for an envelope to mail a book to the corporate office, he gave her one that was too small. She told him it was too small, and he said, "Pretend it's a condom and slip it on real soft."

One day at work, Ryburn overheard Brenneman and another employee talking about how expensive their children's dental bills were. They joked that they wished they could have sex with the dentist in exchange for his services. Ryburn said they could make that arrangement with him.

On another occasion, Ryburn asked how Brenneman was doing. When she said "fine," he said, "Mm-hmmm, you are fine." He then asked her if she needed anything and again slapped her on the buttocks.

When Brenneman asked Ryburn if he could "stab" a customer's ticket, he said, "I'd love to stab you."

Brenneman reported Ryburn's behavior to her trainer. He told her that Ryburn and his wife had just had a baby and maybe Ryburn "needed a little attention and was looking in the wrong place." The trainer told Brenneman that "you're a nice-looking lady. You are fun-loving, energetic, and he's probably attracted to you that way." He told Brenneman that he was talking to her as a friend and not as a representative of Famous Dave's. He told her he would talk to Famous Dave's human resources department and also told her to talk to Ryburn or his supervisor about her concerns. He also told her the company had a telephone hotline number. She told him she was worried about repercussions if she complained.

After this meeting, Ryburn continued to blow kisses at Brenneman, wink at her and make inappropriate comments. So Brenneman tried to call the hotline. The first time, no one answered and she didn't leave a message. The she called again and left a message. She also called her trainer again, who told her he would get her the number for human resources.

Brenneman then told a co-manager about her concerns. The co-manager promptly told human resources, and Karen Schindler from human resources promptly called Brenneman. Schindler asked Brenneman if she wanted to meet with her and Ryburn.

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Brenneman asked Schindler to first talk to Ryburn. Schindler did, and said Ryburn admitted some of the allegations.

Schindler said she wanted to resolve the situation and suggested having Brenneman work at a different location or a different schedule. Brenneman said she wanted to think about it. Schindler tried to call Brenneman several times, but Brenneman didn't return the calls, saying she felt emotionally let down because the situation was not "being taken care of." She resigned. Famous Dave's wrote her a letter inviting her to return to work. Ryburn wrote her as well, apologizing for his behavior and inviting her to return to work. She didn't, instead suing for sexual harassment.

The Court of Appeals said that Brenneman had established a prima facie case against Ryburn. His offensive behavior began shortly after she started working for the company and continued throughout her employment. It included offensive touching and humiliating comments. The Court said that any reasonable person would find this to be a "hostile" environment as the law defines the term.

But, the Court said, she did not suffer a tangible employment action. She said she was constructively discharged, which occurs "when an employer deliberately renders the employee's working conditions intolerable, thereby forcing her to quit." Here, she didn't fulfill her obligation "not to assume the worst and not to jump to conclusions too

quickly." She didn't give the restaurant a reasonable chance to solve the problem. The company investigated. They proposed solutions, including relocating her. They continued to invite her to return to work even after she resigned. Thus, she was not "constructively discharged."

Famous Dave's was able to successfully assert what is called the Ellerth-Faragher affirmative defense. They showed they exercised reasonable care to prevent and correct sexual harassment and that Brenneman had unreasonably failed to take advantage of their preventative or corrective opportunities.

The case is Brenneman v. Famous Dave's of America, Inc. 507 F. 3d 1139 (8th Cir. 2007). ♦

Emphasize The Person, Not The Disability

Some words used to refer to people with disabilities may have negative connotations. Two examples: "a handicapped man confined to a wheelchair" and "a girl stricken with cerebral palsy." Both emphasize the disability and the person's limitation instead of the person and his or her ability.

When writing or speaking about people with disabilities, it's best to try to use what is called "people first" language. Say "a person with a disability" instead of "a disabled person" or "a person who uses a wheelchair" instead of "a wheelchair-bound person." (People are not "bound to a wheelchair" or "confined to a wheelchair." Their wheelchairs give them mobility, not confinement.) Try to avoid grouping people together by talking about "the mentally retarded." Again, fo-

cus on individuals, not the disability.

It's also important to try to avoid using emotional or sensationalist words, because such words may encourage others to think of people with disabilities as either inspirational and courageous or pitiful and in need of charity. Both are erroneous stereotypes.

The following is a list of disrespectful terms along with a more respectful alternative:

- Crippled, spastic/Cerebral palsy, physical disability
- dumb or deaf-mute/communication disorder or deaf
- handicap/disability

- handicap parking/accessible parking
- wheelchair bound/uses a wheelchair
- insane or crazy/psychiatric disability
- stricken or victim/has a disability
- retard or mongoloid/cognitive or intellectual impairment

(Based on *The Power of Words, A Guide to Interacting with People with Disabilities*, brochure published by Indiana Governor's Council for People with Disabilities). ♦



Independent Contractor v. Employee

Very often, it's important to know if an individual is an employee or an independent contractor. If the person is an employee and gets hurt on the job, the employer will likely have to provide workers' compensation. But if the person is an independent contractor, then workers' compensation is not required. Similarly, civil rights laws prohibit employers from discriminating against employees on the basis of race, religion, sex, disability, and other legally protected categories. But these laws don't protect independent contractors from such discrimination.

Courts have applied a ten-factor test to make the sometimes difficult determination about whether an individual is an employee or an independent contractor. The factors include the following:

- The extent of control which, by agreement, the master may exercise over the details of the work.

- Whether or not the one employed is engaged in a distinct occupation or business.

- The kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the employer or by a specialist without supervision.

- The skill required in the particular occupation.

- Whether the employer or the worker supplies the tools, instrumentalities and the place of work for the person doing the work.

- The length of time for which the person is employed.

- The method of payment, whether by the time or by the job.

- Whether or not the work is part of the regular business of the employer.

- Whether or not the parties believe they are creating the relation of employer and employee, and

- Whether the principal (i.e., the employer) is in the business.

As an Indiana court said, all of these factors have to be considered, and no single factor is dispositive. If you have questions about the applicability of civil rights laws to your situation, feel free to contact the Bloomington Human Rights Commission.

The case is Howard v. U.S. Signcrafters, 811 N.E. 2d 479 (Ind. App. 2004). ♦

Merrill Lynch To Pay \$1.55 Million For Discrimination Complaint Against Iranian Muslim

The Equal Employment Opportunity Commission (EEOC) announced that Merrill Lynch, the international financial services firm, has agreed to pay \$1.55 million to settle a discrimination lawsuit under Title VII of the Civil Rights Act on behalf of a former employee, an Iranian Muslim.

The EEOC's lawsuit, in the U.S. District Court for the Southern District of New York, alleged that Merrill Lynch refused to promote and terminated Majid Borumand from a position as a quantitative

analyst in August 2005, because of his Iranian national origin and Muslim religion. Merrill Lynch instead retained and promoted a less qualified individual, the EEOC alleged in the lawsuit.

According to the consent decree, in addition to the monetary relief for Borumand, Merrill Lynch will provide training to its employees regarding discrimination based on religion and national origin. The decree states also that Merrill Lynch will not discriminate against employees because of their national

origin or religion, and will not retaliate against employees who oppose discrimination. The decree calls for monitoring by the EEOC to ensure compliance.

EEOC Senior Trial Attorney Michael O'Brien said, "We are pleased with the resolution of this case, not only in terms of the significant monetary benefits, but also for the injunctive relief which will help foster a discrimination-free workplace." ♦

(EEOC website, December 31, 2008)



Asian Culture Center Events

The Indiana University Asian Culture Center is sponsoring a number of events this spring, including the following:

—"Hello, My Name is Nadir Ratanaruegiumrune, But My Friends Call Me Bob," the first in a series of talks about Asian Pacific Americans. The talk will be on Friday, January 23, from 12 to 1, at the IU Asian Culture Center.

—Over a Cup of Tea presents "Remembering Michi Weglyn and the Japanese American Internment," Wednesday, February 11, from 7 to 8 p.m. at the Neal Marshall Black Culture Center Grand Hall, 275 N. Jordan Avenue. The presenter will

be Phil Tajitsu Nash, Literary Executor of Michi Weglyn.

—"Buddha is My Homeboy," the second in the talk series, to be held on Friday, February 20, from 12 to 1 at the ACC.

—Over a Cup of Tea presents "Redefinition of Identity," a lecture and concert by Magdalen Hus Li, on Thursday, March 5, from 7 to 8 p.m. at the Neal Marshall Black Culture Center. This talk is sponsored by the ACC in partnership with the Office of Women's Affairs and GLBT Student Services.

—"Mommy, Why Don't I Look Like You?" the third in the talk series, to be held at the ACC on Friday, March 5, from 12 to 1 p.m. at the ACC.

—Asianfest at the Bloomington's Farmers Market, Saturday, May 2, from 10 a.m. to noon, at the Showers City Hall Atrium and outdoor stage area.

For more information, contact the ACC at 856-5361 or e-mail acc@indiana.edu. ♦

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